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ABSTRACT

The fifth of eight related documents, this booklet is part of a series of papers presented at the 1978 National Right to Read Conference examining issues and problems in literacy. In examining the issue of student accountability, this booklet first sets forth the prototypical case of pupil illiteracy and surveys the arguments that can be made for holding each of four primary agents accountable: individual school professionals, the educational system as a whole, the student, and the parents. It then sets forth two primary modes of accountability to which the agents might be subject, the legal theories that might buttress each, and the probabilities that the courts will in fact impose them. It concludes by predicting that accountability for pupil illiteracy is more likely to be established by statutory and regulatory measures than by judicial intervention and that the goal of literacy will be better served if the courts facilitate, rather than impose, educational reform. (HTH)

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LITERACY: MEETING THE CHALLENGE

Who is Accountable for Pupil Illiteracy?

Paul Tractenberg

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U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
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Office of Education
William L. Smith, *Commissioner*

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FOREWORD

A major goal of the Right to Read Program has been to disseminate information about the status of literacy education, successful products, practices and current research finding in order to improve the instruction of reading. Over the years, a central vehicle for dissemination have been Right to Read conferences and seminars. In June 1978, approximately 350 Right to Read project directors and staff from State and local education and nonprofit agencies convened in Washington, D.C. to consider Literacy: Meeting the Challenge.

The conference focused on three major areas:

- examination of current literacy problems and issues;
- assessment of accomplishments and potential resolutions regarding literacy issues; and
- exchange and dissemination of ideas and material on successful practices toward increasing literacy in the United States.

All levels of education, preschool through adult, were considered.

The response to the Conference was such that we have decided to publish the papers in a series of individual publications. Additional titles in the series are listed separately as well as direction for ordering copies.

SHIRLEY A. JACKSON
Director
Basic Skills Program

LITERACY: MEETING THE CHALLENGE

A Series of Papers Presented at the National Right to Read Conference May 1978

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Donald Fisher

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Who is Accountable for Pupil Illiteracy?
Paul Tractenberg

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SUMMARY

Overview

In the present controversy over public education, many of the most volatile issues concern accountability. Though in the recent past the courts have most commonly imposed accountability measures, legislative and administrative action now predominates in the latest thrust of the accountability movement —the movement to require minimum competency. The 33 State programs already in force and the others contemplated all advance the principle that pupil proficiency in basic skills is a central criterion for evaluating the public schools. They also raise questions of accountability in those cases where students do not meet minimum competency standards. After setting forth the prototypical case of pupil illiteracy, this paper surveys the arguments that can be made for holding each of four primary candidates accountable: individual school professionals, the educational system as a whole, the student, and the parents. It then sets forth two primary modes of accountability to which the candidates might be subject; the legal theories that might buttress each; and the probabilities that the courts will in fact impose them. It concludes by predicting that accountability for pupil illiteracy is more likely to be established by statutory and regulatory measures than by judicial intervention and that the goal of literacy will be better served if the courts facilitate, rather than impose, educational reform.

The Prototypical Case of Pupil Illiteracy

The prototypical case of pupil illiteracy involves four main elements:

- An "educable" child who has not posed serious behavioral, attitudinal, or attendance problems during his or her public school career;
- Regular promotions from grade to grade (and perhaps graduation from high school);
- "Functional illiteracy"; and
- Evidence that the student's life prospects are significantly diminished by his or her present level of performance.

Each element has many nuances and variations that may determine who can be held accountable, what failures can be ascribed to them, and what defenses they may offer. The author exemplifies the variations to which the elements are susceptible and indicates their consequences.

Candidates for Accountability

In the prototypical case there are four primary candidates for accountability and different reasons for seeking to fix responsibility upon each:

- Individual School professionals, whether classroom teachers, special education staff, or chief administrators;
- The educational system as a whole, whether that of a local school district or that of a region as large as the entire state;
- The student, who may be held accountable either as the individual whose incapacity or misconduct causes the failure or as the individual who bears the consequences of the failure; and
- The parents, who may be held accountable either directly, for their own conduct or as proxies for environmental conditions that affect the student's performance, e.g., the socio-economic status of the family.

Modes and Legal Theories of Accountability

Each of the primary parties could be subject to various modes of accountability that fall into two broad categories: monetary damages and education-related requirements and consequences. Thus far, however, the former have been awarded in only one case even remotely related to the prototypical case of pupil illiteracy. In the much-publicized case of Peter W., the California courts rejected the plaintiff's claim that, under theories of tort law, the schools were liable for negligence and misrepresentation, holding that the science of pedagogy did not supply concensual standards of care, cause, or injury and that school systems, already hard-pressed, would suffer if exposed to the claims of countless disaffected students and parents. Tort law and sovereign immunity from tort liability may pose other problems for prospective plaintiffs as well. There are, however, untested theories that, under the doctrine of constitutional torts or under the theory of contracts, students may claim monetary damages if they have not received a certain quantum of appropriate education.

Depending upon the circumstances and the parties involved, various theories can support the imposition of education-related requirements and consequences. Common law and statute will often support job sanctions against individual school professionals, though the particularities of State tenure laws and statewide educational policies will probably determine whether *citizens* can take legal action to force the imposition of such sanctions. Citizens might also impose accountability upon a whole school system through judicial intervention if State law directly or implicitly required the system to respond to a student's inadequate performance. Finally, statute, regulation, or long-standing practice could permit students to be held accountable and hence denied promotion, graduation, or a regular diploma,

though students might challenge such consequences by alleging violations of due process or equal protection. The heart of their challenge would likely involve the validity of minimum competency tests and could embrace related aspects of the accountability system.

Conclusion

Despite these possibilities, there have been few efforts to impose accountability by judicial proceedings, and there are reasons to doubt whether litigation will substantially define it in default of more extensive statutory and regulatory mandates. These latter seem likely to be instituted, and judicial action to enforce or clarify promulgated requirements is more desirable than action which places the judiciary in the role of educational reformer.

WHO IS ACCOUNTABLE FOR PUPIL ILLITERACY?

Introduction

During the 1970's public education has been subjected to increasing public scrutiny and controversy. Many of the most volatile issues can be grouped under the rubric of educational accountability. For example, schools and their personnel have been charged with responsibility for equalizing educational opportunities among racial, ethnic, linguistic and gender groups; they have been required to provide an "appropriate" education to the handicapped; they have been expected to treat students and teachers with procedural fairness. These accountability measures have been imposed most commonly by the courts. The courts may play a pivotal role, too, in the development of the latest major accountability effort—the minimum competency movement. At the moment, however, legislative and administrative action predominates. As of March 15, 1978, 33 States had taken some action to require minimum competency standards for elementary and secondary students. All the remaining States have legislation pending or they are studying the matter[1]. The programs take many forms, but they share one fundamental value—that pupil achievement in the basic skills is a central criterion for measuring the success of the public schools. If students fail to demonstrate adequate achievement, however measured, the questions which must be answered are: (1) who is to be held accountable; (2) in what way; and (3) through the application of what theories.

This paper will address each of those questions, after setting out the elements of the prototypical pupil illiteracy case. I will also hazard some predictions about future legal developments in this area. It should be noted that the determinations of what constitutes functional literacy and which pupils fall below that standard are the subjects of sharp disagreement among the "experts" and substantial confusion for interested laymen.[2] This paper will not attempt to plumb those depths except to the limited extent necessary to explain legal accountability matters.

The Prototypical Case

The prototypical case for seeking to impose educational "accountability" based on the circumstances of an individual pupil involves at least the following four elements:

- An "educable" child who has not posed serious behavioral, attitudinal or attendance problems during his or her public school career;

- Regular promotions from grade-to-grade (and perhaps graduation from high school);
- "Functional illiteracy"; and
- Evidence that the student's life prospects are significantly diminished by his or her present level of performance.

Each of these elements, of course, has many possible nuances and variations. For example, the "educable" child might have an average or even above average intelligence, as measured by IQ tests, and present no evidence of a learning disability.[3] In that case, the alleged default of the school authorities would be their failure to provide an educational program which permitted or required the student to perform up to capacity. On the other hand, the "educable" child might be claimed to have a learning disability (although perhaps average or above average intellectual potential). The default of educators, in that circumstance, likely would be not only their failure to provide an appropriate educational program, but also their prior failure to identify and respond to the learning disability. The latter alternative would raise medical and psychological, as well as educational, issues.[4]

There also may be a range of factual differences regarding the student's attitude and behavior, both in school and outside. Indeed, the "nonschool variables," especially racial or ethnic identity and socioeconomic status, are likely to be raised by the school authorities as relevant to assessing the pupils' academic potential.

The regularity of the student's passage through the public schools, too, is likely to vary from case to case. In some, the student may have received relatively good grades, and the parents may never have been informed of any academic difficulties. In others, the record may demonstrate a clearly marginal student. Whether or not the State or local school district has explicit promotion criteria will be relevant as well.

The existence of State or local standards will be even more significant in evaluating the third element of the prototypical case—the evidence of "functional illiteracy." There are sufficient differences of opinion among the experts about what functional literacy means and how to test for it that, absent specific enforceable standards applicable to the particular case, this element may result in an inconclusive welter of competing viewpoints.

The final element—significant diminution of the student's life prospects—is the least likely to provoke serious controversy. This is not necessarily because the cause-effect relationship between literacy and life "success" is so clear; rather, it is because school authorities are unlikely to defend themselves by asserting the unimportance of educational outcomes.

Who Could Be Held Accountable

If the prototypical case can be established, four parties to the student's educational situation are the primary candidates for accountability. They are: (1) the individual school professionals; (2) the educational system as a whole; (3) the student; or (4) the parents and other participants in the student's life environment.

(1) *Individual school professionals.* The individual school professionals may cover a broad gamut, from classroom teachers of the student to the chief education officer of the State. In a case where no learning disability has been alleged, only those involved in the "regular instructional process are likely to be targets of accountability. Where a learning disability is,claimed, the special education staff—diagnostic as well as instructional personnel—may be involved in addition to, or instead of, the regular instructional staff.[5]

An effort to impose accountability upon individual school professionals usually is based upon the view that fixing responsibility most specifically and upon persons having the most direct contact with students is the likeliest way to effect change in the educational process.

(2) *The educational system as a whole.* Accountability of the entire educational system, of a local school district or of a larger region including perhaps the entire State, is another possibility. A number of general accountability models, including one developed for the New York City school system, are based on the concept of joint accountability. This approach is premised on the view that it is more constructive, more realistic, and less threatening to individual professionals to hold them responsible only as part of a larger educational mechanism.

This approach may have some strengths when accountability for the overall academic performance of a school district is the goal. It is less responsive, however, to claims that a school system has failed individual students by causing or permitting them to be functionally illiterate.

(3) *The student.* The student may be held accountable for his or her own illiteracy in two respects—by a conclusion that the student's intellectual capacity or conduct caused the resultant low academic performance, or by the student bearing the consequences of the low performance (*i.e.*, being denied promotion, graduation or a regular diploma). Holding the student accountable in either of those respects may be virtually tantamount to finding that neither the individual school professionals nor the entire educational system should be held accountable.

(4) *The parents.* The parents, in their own right or as proxies for the non-school life environment of the student, may be held accountable for the student's low performance levels. This can occur in several ways: the student's

performance can be explained or justified by reference to the racial or ethnic, linguistic or socioeconomic circumstances of the family; or it can be ascribed to conduct of the particular parents (i.e., domestic difficulties, physical or other abuse of the child, refusal to comply with the requests of school authorities). In the *McNeil* case, the parents were brought formally into the litigation by the defendant-school professionals as "third party defendants," largely because the parents were claimed to have been uncooperative. The school authorities, in effect, were arguing that if their own behavior in the school context was faulty it resulted from the parents' unwillingness to permit certain educational programs to be attempted.[6]

What Could They Be Held Accountable For?

Each of the primary parties who might be held accountable for pupil illiteracy could be subject to different modes of accountability. This section of the paper briefly will sketch the possibilities. The theoretical underpinnings and prospects of successful imposition of each of these forms of accountability will be discussed in greater detail in the succeeding sections of the paper.

(1) *Individual school professionals.* Two substantial kinds of accountability have been broached for individual school professionals whose inadequate performance may have contributed to the functional illiteracy of particular students: job sanctions, including even removal from their positions; and the imposition of money damages through a court proceeding.

(2) *The school system as a whole.* The school system may be held accountable in analogous ways to individual professionals. Its educational performance may be called into question, especially by evidence that significant numbers of students are performing at inadequate levels. The responses may fall into several patterns: the district may be "disapproved" in some form and required to develop remedial plans; State funds may be withheld (or additional State funds provided); specific requirements for remedial or compensatory programs for low-achieving students may be triggered; a higher level of regional or State intervention may occur.

The school system may also be requested to pay money damages to "injured" students. In fact, most of the lawsuits which have sought such damages have joined the school district and its board of education with individual professionals as the defendants.

(3) *The student.* Different modes of accountability typically are considered in relation to the functionally illiterate student. These include retention in grade for inadequate performance, required compensatory or remedial instruction, evaluation and perhaps classification as handicapped or learning disabled, and ultimately denial of graduation or of a regular diploma.[7]

Beyond these, if school authorities can justify low performance levels of students by reference to their status or conduct, then students will in effect be held responsible for their own illiteracy. Some commentators, critical of this approach, have referred to it as blaming the victims for having been victimized.

(4) *The parents.* The parents of functionally illiterate students can be held accountable in the same way if *their* status or conduct provides school authorities with a justification, in law or fact, for such illiteracy. In addition, if the parents' ongoing conduct were found to be interfering with the appropriate education of their child, a court might order the parents to change their behavior. Finally, parents might also be found to have pecuniary responsibility to their children if the parents' conduct was considered by a court to have contributed to the students' inadequate performance.

Legal Theories For Imposing Accountability

The prior section suggests that there are two broad kinds of accountability which might be imposed upon some or all of the primary parties in the prototypical case of student illiteracy. These are the exaction of money damages and the imposition of a variety of other education-related requirements and consequences. Money damages may be relevant to individual school professionals, to school systems and, possibly, to parents. The other, education-related forms of accountability may apply to those parties and to the students.

(1) *Money damages.* The *Peter W.* case, in which the plaintiff-student originally sought $1 million in damages from the school system and individual professionals, brought to national attention the possibility of this type of accountability for pupil illiteracy. However, that case has been totally unsuccessful. Both the trial court and an intermediate appeals court in California rejected all the plaintiff's accountability arguments,[8] and the State supreme court refused to consider the case.

In that case, the student sought to impose financial liability on the basis of two theories of tort law: negligence and misrepresentation. To establish a cause of action based upon negligence, the plaintiff must prove the existence of three elements: (1) that the defendent owed the plaintiff a legally enforceable duty of care; (2) that the defendant negligently breached that duty; and (3) that the breach caused a legally cognizable injury to the plaintiff. A detailed analysis of the application of negligence doctrine to student illiteracy is beyond the scope of this paper.[9] Suffice it to say here, that the California courts have rejected liability in such a case on grounds of public policy and practicality. The appeals court refused to impose upon school personnel or the educational system generally a legal "duty of care" in the discharge of their academic functions. It also concluded that the failure of educational achieve-

ment could not be regarded as a legal "injury" for tort law purposes. The court justified its conclusions in the following terms:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught... The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[10]

The court also buttressed its conclusions by referring to the practical problems which would be created for already hard-pressed school systems if they were exposed "to the tort claims—real or imagined—of disaffected students and parents in countless numbers.[11]

The court gave equally short shrift to plaintiff's argument that the defendants had "falsely and fraudulently" misrepresented the student's educational status. Its conclusion was that the plaintiff had failed even to allege reliance upon the "misrepresentation," an essential element of that cause of action.

Beyond the issues upon which the court in *Peter W.* relied for its disposition of the case are two others which likely will prove troublesome to plaintiffs in other cases—proving a causal connection between the inadequate conduct of school authorities (assuming that can be established) and the student's functional illiteracy; and surmounting the barrier of sovereign immunity from tort liability. [12]

Another type of tort liability should be mentioned; that is, liability of school officials for "constitutional torts." All manner of unconstitutional actions taken by public school officials against students (and teachers) may expose those officials to liability in money damages as a result of the United States Supreme Court's decision in *Wood v. Strickland.*[13] To the extent students might come to have a constitutionally recognized right to a certain quantum of appropriate education, the liability possibilities created by the *Wood* case have to be kept in mind.

Finally, some commentators have suggested that pecuniary liability might be imposed upon school authorities through theories of contract or quasi-contract law rather than tort law.[14] The basic theory is that the public education system and its personnel have an obligation, in the nature of an implied contractual commitment, to provide students with an appropriate education. The students' *quid pro quo* (although under statutory compulsion) is a commitment to attend school. No court has relied definitively yet on this theory.

In fact, the only case, related at all to our prototypical case, in which money damages have been ordered is the *Hoffman* case.[15] The plaintiff there was awarded $750,000 because he was improperly classified as mentally retarded and then educated as mentally retarded for his entire academic career. The case is now on appeal.

The other broad form of accountability—education-related requirements and consequences— can be supported by various theories depending upon the particular circumstances and the particular party involved.

In the case of individual school professionals, job sanctions may be available under several statutory and common law theories. School personnel generally are subject to periodic evaluation. If they are found to be performing unsatisfactorily, they may be denied a salary increment, given other disciplinary measures, or even terminated from their positions. In many States this is governed by statute or administrative regulation; in others it is a function of long-standing practice. In States with tenure provisions, termination of tenured personnel usually is accompanied by considerable procedural requirements and at least generally stated criteria. Although some States are moving toward the inclusion of "pupil progress" as one of the stated criteria for evaluating teacher competence, in most States the bases for dismissal of tenured personnel still are stated in terms such as inefficiency, incapacity, incompetency, "conduct unbecoming a teacher," and "other just cause."

Decisions regarding continuation of nontenured personnel generally remain less constrained by statutory and administrative requirements. However, some courts have required at least rudimentary procedural protection in the form, for example, of a statement of reasons for nonrenewal. Moreover, even nontenured personnel cannot be dismissed for constitutionally proscribed reasons, such as exercise of the rights of freedom of speech or association. In addition to such judicial constraints upon job sanctions against individual school professionals, provisions of collective bargaining agreements increasingly are creating a sort of contractual tenure.

Despite these developments, it is likely that if a school system chose to impose accountability requirements in the area of pupil performance upon individual professionals, and did so in a rational fashion, such action would be sustained by the courts. In one case, the United States Supreme Court has sustained such a result.[15] The more difficult question is whether a school district can be *required* to take such action. There are at least two possible approaches. Pursuant to some State tenure laws, any citizen can force the local school district to consider whether charges should be brought against a tenured professional under the administrative hearing process. The other possibility involves a mandamus action seeking a court order which directs the school authorities to carry out their responsibilities. One of those responsibilities, it would be argued, was to evaluate the professional staff on the basis of pupil performance or progress against a standard of literacy. The likelihood

that such an action would be successful will depend, to a considerable extent, upon the circumstances in the particular State. If, for example, the State had explicit statewide pupil performance standards, a judicially-imposed requirement that they be used as one of the criteria to evaluate teaching competence might be conceivable. Of course, this presupposes that the State legislature or State board of education, whichever promulgated the performance standards, had not barred their use for staff evaluation purposes.

Another type of mandamus action might be utilized to impose accountability upon the school system as whole. If State law provides, directly or implicitly, for some school system response to inadequate performance by an individual student and the response is not forthcoming in a sufficient way, judicial intervention could be sought. Such an action might be based upon a broad constitutional clause requiring the State to provide a particular quantum of education (i.e., "thorough and efficient," "high quality"). Or it might be based upon more specific statutory or regulatory provisions.[16]

Finally, by stature, regulation or long-standing practice, students could be held accountable for their failure to achieve required proficiency levels. As indicated in the prior section, the responses might range from retention in grade to denial of graduation or of a regular diploma. The student might challenge any of these educational consequences by arguing that it violated his or her rights to equal protection or due process of the laws.[17] The equal protection argument would be strongest if it could be supported by evidence that disproportionately great numbers of minority students were failing to meet the standards.[18] Even then, however, the challengers would have to overcome some recent U.S. Supreme Court decisions requiring proof of discriminatory intent for an equal protection violation.[19]

Proving the invalidity of the minimum competency test (or successfully countering the school authorities' efforts to demonstrate the validity of the test) is another essential element of an equal protection challenge. It is also likely to be at the heart of a due process challenge. The latter challenge would assert that the school system was acting arbitrarily and capriciously, or without adequate procedural safeguards, in classifying a student as below minimum competency. The challenge could include many aspects of the accountability system—the nature of the competency standards, the mechanism for determining whether particular students met the standards, and the educational response to students falling below the standards.

Summing Up and Looking Ahead

Thus far there have been a relatively limited number of efforts to impose accountability for pupil illiteracy through judicial proceedings. Despite the substantial publicity generated by these cases, the broadest and best publicized of the cases failed at each of three levels of the California judiciary,

and the California State court system is considered one of the most progressive in the country.[20]

Most efforts to create reform through judicial activism have experienced similar setbacks initially. School desegregation and school finance reform are only two examples of many in which courts, after rejecting causes of action, subsequently ruled in favor of challenges and set in motion a complex and controversial reform effort. Conceivably this could occur with educational accountability for pupil illiteracy.

But *Peter W.* may not point the way toward the most likely avenue for litigation success. Its focus on money damages rather than direct educational reform has several undesirable aspects. First, courts are well aware, as the California court indicated in *Peter W.*, of the financial straits of most school systems. To impose additional burdens on them may lead to diminished rather than improved education. Second, money damages paid to a student or the student's parents may never find their way into compensatory or remedial education and, as a practical matter, the court cannot (and should not) supervise the use of the funds.

Peter W.'s reliance on the common law of negligence also may not be the most desirable litigation orientation. Surely an adventurous judge somewhere, in an appropriate case, might expand further the already burgeoning field of professional malpractice so that it included school professionals' performance of their academic duties. Indeed, that is a quite probable development. Whether it will result in general acceptance of this form of educational accountability is less certain.

My view is that accountability for pupil illiteracy is more likely to develop within the expanding statutory and regulatory framework.[21] Legal actions would be directed toward ensuring mandates. This may take such forms as actions designed to bring about rationally-developed performance standards, valid competency tests, adequately funded and carefully conceived compensatory or remedial programs for students who are falling below the standards. These actions might be addressed at implementation of specific, already promulgated requirements, or they might seek to flesh out general statutory or regulatory mandates. Indeed, they might even be directed at invalidating inadequate State accountability programs.

A primary advantage of these types of litigation is that they build upon a foundation created by the other branches of government. They seek to put the courts in the position of facilitator rather than initial imposer of educational reform. This is a role in which the judiciary should feel more comfortable and, therefore, more likely to place itself. Hopefully, this approach will also reassure school systems and their professionals that the courts are not eagerly awaiting any pretext to become super-boards of education.

Improved education and higher levels of pupil literacy, the common goal of all the participants, can be achieved most surely and most expeditiously by cooperation rather than fiat.

FOOTNOTES

[1] Pipho, Minimum Competency Testing in 1978: A Look at State Standards, 59 Phi Delta Kappan 585 (May 1978). Virtually the entire May 1978 issue of Phi Delta Kappan is devoted to minimum competency testing.

[2] Compare Glass, *Minimum Competence and Incompetence in Florida*, 59 Phi Dalta Kappan 602 (May 1978), with Fremer, *In Response to Gene Glass* 59 Phi Delta Kappan 605 (May 1970). See generally Brickwell, *Seven Key Notes on Minimum Competency Testing*, 59 Phi Delta Kappan 589 (May 1978).

[3] This was alleged to be the situation in *Peter W. v. San Francisco Unified School Dist.*, 131 Cal. App. 3d 814 (1976), the leading educational accountability decision.

[4] Several pending lawsuits involve such claims. See, e.g., *McNeil v. Board of Educ. of South Orange and Maplewood* (N.J. Superior Ct., Law Div., Essex Co.). In June 1978, the jury returned a verdict in favor of the defendents in the *McNeil* case, finding that the plaintiff had failed to prove a basis for recovery.

[5] In the *McNeil* case, *supra*, diagnostic personnel and their superiors, including the superintendent of schools and board of education, were the only defendents named because the primary accountability thrust was failure to identify and respond to a learning problem.

[6] If this theory is successful, a possible consequence may be suits by students directly against their parents. In fact, a suit akin to this has already been filed in Colorado. *Hansen v. Hansen*, Dist. Ct., Boulder Co., Colo., May 1978.

[7] Many States are considering the award of a certificate of attendance, rather than a diploma, to students who fail to achieve specified performance levels.

[8] See 131 Cal. Rptr. 854, 60 Cal. App. 3d 867 (1976).

[9] See Note, *Educational Malpractice*, 124 U. Pa. L. Rev. 755 (1976).

[10] 131 Cal. Rptr. at 860-61, 60 Cal. App. 3d at 824.

[11] 131 Cal. Rptr. at 861, 60 Cal. App. 3d at 825

[12] Most States, as well as the Federal Government, have reduced sharply the scope of immunity through court decisions and statutes, but liability may still be barred in circumstances relevant to our prototypical case, (*i.e.*, if the negligent conduct were found to be "discretionary").

[13] 420 U.S. 308 (1975). For a detailed treatment of the implications of the *Wood* case, see Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49, So. Cal. L. Rev. 1322 (1976).

[14] See Note, *Educational Malpractice*, 124, U. Pa. L. Rev. 755, 784 (1976).

[15] *Hoffman v. Board of Educ. of the City of New York* (Sup. Ct., Kings Co., N.Y.).

[16] *Scheelhaase v. Woodbury Central Community School Dist.*, 349 R. Supp. 988 (D. Iowa 1972), *rev'd*, 488 F. 2d 237 (8th Cir. 1973), *Cert. denied*, 417 U.S. 969 (1974). Interestingly, in a contemporaneous case involving the dismissal of a nontenured teacher, the teacher sought to prove his subject matter competence by reference to his students' improved scores on standardized tests. *Dathe v. Wildrose School Dist.*, 217 N. W. 2d 781, 784 (N. Dal. 1974). See also *McCrum v. Board of Educ. of the City of New York*, 396 N.Y.S. 2d 691 (App. Div. 2d Dept. 1977).

[17] In California, at the time the *Peter W.* case was filed, there was a statutory requirement that students read at the "8th grade" level in order to qualify for high school graduation. Such a requirement might result in a claim for compensatory instruction to enable the student to reach that performance level.

[18] The legality of an accountability system could be challenged by school professionals upon whom sanctions are imposed as well as by students. The professionals' prospects for success are smaller, however, for several reasons: (i) professionals have chosen to be employed and to be subject to their employers' standards; students are compelled by law to attend school; (ii) the impact on a school professional's life prospects of being held accountable for inadequate pupil performance, although hardly insignificant, is likely to be less substantial than that experienced by a student who is denied the right to graduate.

[19] A case is rumored to be in preparation by the Florida NAACP attacking that State's minimum competency program because it has resulted in such a disproportion. For detailed treatment of this question, See McClung, *Competency Testing: Potential for Discrimination*, 11 Clearinghouse Rev. 439 (1977); Tractenberg & Jacoby, *Pupil Testing A Legal View*, 59 Phi Delta Kappan 249 (1977).

[20] See, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976).

[21] Of course, many of the statutory and regulatory developments in this area may result, at least indirectly, from concern about liability generated by cases such as *Peter W.*

[22] Lawsuits, such as *Hoffman* and *McNeil*, *supra*, involving alleged misclassification or failure to classify students according to their special learning needs, may continue to be pursued independently of general accountability efforts. But some commentators have advocated an incremental litigation strategy in which the ultimate goal of broad accountability for pupil illiteracy is approached by identifying a series of more limited accountability steps which are taken sequentially. *Hoffman* and *McNeil* could be conceived of as part of such a strategy.

[23] For more discussion of these possibilities, see Tractenberg, *The Legal Implications of Statewide Pupil Performance Standards* (an unpublished paper prepared for the National Institute of Education and the Education Commission of the States, September 1977).

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